

ASSEMBLY BILL

No. 2760

Introduced by Assembly Member Tran

February 19, 2010

An act to amend Section 12652 of the Government Code, relating to false claims.

LEGISLATIVE COUNSEL'S DIGEST

AB 2760, as introduced, Tran. False Claims Act: prevailing defendant: attorney's fees.

Existing law, the False Claims Act, provides that a person who commits any one of several enumerated acts relating to the submission to the state or a political subdivision of the state a false claim for money, property, or services, as specified, shall be liable to the state or political subdivision for certain damages and may be liable for a civil penalty. Existing law authorizes the Attorney General, a prosecuting authority of a political subdivision of the state, or a qui tam plaintiff to bring a civil action to enforce these provisions. Existing law authorizes a court to award a prevailing defendant its reasonable attorney's fees and expenses, as prescribed.

This bill would require, in a civil action relative to a claim arising from a public works contract, a court to award a prevailing defendant its reasonable attorney's fees and expenses.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 12652 of the Government Code is amended to read:

12652. (a) (1) The Attorney General shall diligently investigate violations under Section 12651 involving state funds. If the Attorney General finds that a person has violated or is violating Section 12651, the Attorney General may bring a civil action under this section against that person.

(2) If the Attorney General brings a civil action under this subdivision on a claim involving political subdivision funds as well as state funds, the Attorney General shall, on the same date that the complaint is filed in this action, serve by mail with “return receipt requested” a copy of the complaint on the appropriate prosecuting authority.

(3) The prosecuting authority shall have the right to intervene in an action brought by the Attorney General under this subdivision within 60 days after receipt of the complaint pursuant to paragraph (2). The court may permit intervention thereafter upon a showing that all of the requirements of Section 387 of the Code of Civil Procedure have been met.

(b) (1) The prosecuting authority of a political subdivision shall diligently investigate violations under Section 12651 involving political subdivision funds. If the prosecuting authority finds that a person has violated or is violating Section 12651, the prosecuting authority may bring a civil action under this section against that person.

(2) If the prosecuting authority brings a civil action under this section on a claim involving state funds as well as political subdivision funds, the prosecuting authority shall, on the same date that the complaint is filed in this action, serve a copy of the complaint on the Attorney General.

(3) Within 60 days after receiving the complaint pursuant to paragraph (2), the Attorney General shall do either of the following:

(A) Notify the court that it intends to proceed with the action, in which case the Attorney General shall assume primary responsibility for conducting the action and the prosecuting authority shall have the right to continue as a party.

1 (B) Notify the court that it declines to proceed with the action,
2 in which case the prosecuting authority shall have the right to
3 conduct the action.

4 (c) (1) A person may bring a civil action for a violation of this
5 article for the person and either for the State of California in the
6 name of the state, if any state funds are involved, or for a political
7 subdivision in the name of the political subdivision, if political
8 subdivision funds are exclusively involved. The person bringing
9 the action shall be referred to as the qui tam plaintiff. Once filed,
10 the action may be dismissed only with the written consent of the
11 court and the Attorney General or prosecuting authority of a
12 political subdivision, or both, as appropriate under the allegations
13 of the civil action, taking into account the best interests of the
14 parties involved and the public purposes behind this act. No claim
15 for any violation of Section 12651 may be waived or released by
16 any private person, except if the action is part of a court approved
17 settlement of a false claim civil action brought under this section.
18 Nothing in this paragraph shall be construed to limit the ability of
19 the state or political subdivision to decline to pursue any claim
20 brought under this section.

21 (2) A complaint filed by a private person under this subdivision
22 shall be filed in superior court in camera and may remain under
23 seal for up to 60 days. No service shall be made on the defendant
24 until after the complaint is unsealed.

25 (3) On the same day as the complaint is filed pursuant to
26 paragraph (2), the qui tam plaintiff shall serve by mail with “return
27 receipt requested” the Attorney General with a copy of the
28 complaint and a written disclosure of substantially all material
29 evidence and information the person possesses.

30 (4) Within 60 days after receiving a complaint and written
31 disclosure of material evidence and information alleging violations
32 that involve state funds but not political subdivision funds, the
33 Attorney General may elect to intervene and proceed with the
34 action.

35 (5) The Attorney General may, for good cause shown, move
36 the court for extensions of the time during which the complaint
37 remains under seal pursuant to paragraph (2). The motion may be
38 supported by affidavits or other submissions in camera.

1 (6) Before the expiration of the 60-day period or any extensions
2 obtained under paragraph (5), the Attorney General shall do either
3 of the following:

4 (A) Notify the court that it intends to proceed with the action,
5 in which case the action shall be conducted by the Attorney General
6 and the seal shall be lifted.

7 (B) Notify the court that it declines to proceed with the action,
8 in which case the seal shall be lifted and the qui tam plaintiff shall
9 have the right to conduct the action.

10 (7) (A) Within 15 days after receiving a complaint alleging
11 violations that exclusively involve political subdivision funds, the
12 Attorney General shall forward copies of the complaint and written
13 disclosure of material evidence and information to the appropriate
14 prosecuting authority for disposition, and shall notify the qui tam
15 plaintiff of the transfer.

16 (B) Within 45 days after the Attorney General forwards the
17 complaint and written disclosure pursuant to subparagraph (A),
18 the prosecuting authority may elect to intervene and proceed with
19 the action.

20 (C) The prosecuting authority may, for good cause shown, move
21 for extensions of the time during which the complaint remains
22 under seal. The motion may be supported by affidavits or other
23 submissions in camera.

24 (D) Before the expiration of the 45-day period or any extensions
25 obtained under subparagraph (C), the prosecuting authority shall
26 do either of the following:

27 (i) Notify the court that it intends to proceed with the action, in
28 which case the action shall be conducted by the prosecuting
29 authority and the seal shall be lifted.

30 (ii) Notify the court that it declines to proceed with the action,
31 in which case the seal shall be lifted and the qui tam plaintiff shall
32 have the right to conduct the action.

33 (8) (A) Within 15 days after receiving a complaint alleging
34 violations that involve both state and political subdivision funds,
35 the Attorney General shall forward copies of the complaint and
36 written disclosure to the appropriate prosecuting authority, and
37 shall coordinate its review and investigation with those of the
38 prosecuting authority.

39 (B) Within 60 days after receiving a complaint and written
40 disclosure of material evidence and information alleging violations

1 that involve both state and political subdivision funds, the Attorney
2 General or the prosecuting authority, or both, may elect to intervene
3 and proceed with the action.

4 (C) The Attorney General or the prosecuting authority, or both,
5 may, for good cause shown, move the court for extensions of the
6 time during which the complaint remains under seal under
7 paragraph (2). The motion may be supported by affidavits or other
8 submissions in camera.

9 (D) Before the expiration of the 60-day period or any extensions
10 obtained under subparagraph (C), the Attorney General shall do
11 one of the following:

12 (i) Notify the court that it intends to proceed with the action, in
13 which case the action shall be conducted by the Attorney General
14 and the seal shall be lifted.

15 (ii) Notify the court that it declines to proceed with the action
16 but that the prosecuting authority of the political subdivision
17 involved intends to proceed with the action, in which case the seal
18 shall be lifted and the action shall be conducted by the prosecuting
19 authority.

20 (iii) Notify the court that both it and the prosecuting authority
21 decline to proceed with the action, in which case the seal shall be
22 lifted and the qui tam plaintiff shall have the right to conduct the
23 action.

24 (E) If the Attorney General proceeds with the action pursuant
25 to clause (i) of subparagraph (D), the prosecuting authority of the
26 political subdivision shall be permitted to intervene in the action
27 within 60 days after the Attorney General notifies the court of its
28 intentions. The court may authorize intervention thereafter upon
29 a showing that all the requirements of Section 387 of the Code of
30 Civil Procedure have been met.

31 (9) The defendant shall not be required to respond to any
32 complaint filed under this section until 30 days after the complaint
33 is unsealed and served upon the defendant pursuant to Section
34 583.210 of the Code of Civil Procedure.

35 (10) When a person brings an action under this subdivision, no
36 other person may bring a related action based on the facts
37 underlying the pending action.

38 (d) (1) No court shall have jurisdiction over an action brought
39 under subdivision (c) against a Member of the State Senate or
40 Assembly, a member of the state judiciary, an elected official in

1 the executive branch of the state, or a member of the governing
2 body of any political subdivision if the action is based on evidence
3 or information known to the state or political subdivision when
4 the action was brought.

5 (2) A person may not bring an action under subdivision (c) that
6 is based upon allegations or transactions that are the subject of a
7 civil suit or an administrative civil money penalty proceeding in
8 which the state or political subdivision is already a party.

9 (3) (A) No court shall have jurisdiction over an action under
10 this article based upon the public disclosure of allegations or
11 transactions in a criminal, civil, or administrative hearing, in an
12 investigation, report, hearing, or audit conducted by or at the
13 request of the Senate, Assembly, auditor, or governing body of a
14 political subdivision, or by the news media, unless the action is
15 brought by the Attorney General or the prosecuting authority of a
16 political subdivision, or the person bringing the action is an original
17 source of the information.

18 (B) For purposes of subparagraph (A), “original source” means
19 an individual who has direct and independent knowledge of the
20 information on which the allegations are based, who voluntarily
21 provided the information to the state or political subdivision before
22 filing an action based on that information, and whose information
23 provided the basis or catalyst for the investigation, hearing, audit,
24 or report that led to the public disclosure as described in
25 subparagraph (A).

26 (4) No court shall have jurisdiction over an action brought under
27 subdivision (c) based upon information discovered by a present
28 or former employee of the state or a political subdivision during
29 the course of his or her employment unless that employee first, in
30 good faith, exhausted existing internal procedures for reporting
31 and seeking recovery of the falsely claimed sums through official
32 channels and unless the state or political subdivision failed to act
33 on the information provided within a reasonable period of time.

34 (e) (1) If the state or political subdivision proceeds with the
35 action, it shall have the primary responsibility for prosecuting the
36 action. The qui tam plaintiff shall have the right to continue as a
37 full party to the action.

38 (2) (A) The state or political subdivision may seek to dismiss
39 the action for good cause notwithstanding the objections of the
40 qui tam plaintiff if the qui tam plaintiff has been notified by the

1 state or political subdivision of the filing of the motion and the
2 court has provided the qui tam plaintiff with an opportunity to
3 oppose the motion and present evidence at a hearing.

4 (B) The state or political subdivision may settle the action with
5 the defendant notwithstanding the objections of the qui tam plaintiff
6 if the court determines, after a hearing providing the qui tam
7 plaintiff an opportunity to present evidence, that the proposed
8 settlement is fair, adequate, and reasonable under all of the
9 circumstances.

10 (f) (1) If the state or political subdivision elects not to proceed,
11 the qui tam plaintiff shall have the same right to conduct the action
12 as the Attorney General or prosecuting authority would have had
13 if it had chosen to proceed under subdivision (c). If the state or
14 political subdivision so requests, and at its expense, the state or
15 political subdivision shall be served with copies of all pleadings
16 filed in the action and supplied with copies of all deposition
17 transcripts.

18 (2) (A) Upon timely application, the court shall permit the state
19 or political subdivision to intervene in an action with which it had
20 initially declined to proceed if the interest of the state or political
21 subdivision in recovery of the property or funds involved is not
22 being adequately represented by the qui tam plaintiff.

23 (B) If the state or political subdivision is allowed to intervene
24 under paragraph (A), the qui tam plaintiff shall retain principal
25 responsibility for the action and the recovery of the parties shall
26 be determined as if the state or political subdivision had elected
27 not to proceed.

28 (g) (1) (A) If the Attorney General initiates an action pursuant
29 to subdivision (a) or assumes control of an action initiated by a
30 prosecuting authority pursuant to subparagraph (A) of paragraph
31 (3) of subdivision (b), the office of the Attorney General shall
32 receive a fixed 33 percent of the proceeds of the action or
33 settlement of the claim, which shall be used to support its ongoing
34 investigation and prosecution of false claims.

35 (B) If a prosecuting authority initiates and conducts an action
36 pursuant to subdivision (b), the office of the prosecuting authority
37 shall receive a fixed 33 percent of the proceeds of the action or
38 settlement of the claim, which shall be used to support its ongoing
39 investigation and prosecution of false claims.

(C) If a prosecuting authority intervenes in an action initiated by the Attorney General pursuant to paragraph (3) of subdivision (a) or remains a party to an action assumed by the Attorney General pursuant to subparagraph (A) of paragraph (3) of subdivision (b), the court may award the office of the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery under subparagraph (A), taking into account the prosecuting authority's role in investigating and conducting the action.

(2) If the state or political subdivision proceeds with an action brought by a qui tam plaintiff under subdivision (c), the qui tam plaintiff shall, subject to paragraphs (4) and (5), receive at least 15 percent but not more than 33 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the qui tam plaintiff substantially contributed to the prosecution of the action. When it conducts the action, the Attorney General's office or the office of the prosecuting authority of the political subdivision shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims made against the state or political subdivision. When both the Attorney General and a prosecuting authority are involved in a qui tam action pursuant to subparagraph ~~(C)~~ (E) of paragraph ~~(6)~~ (8) of subdivision (c), the court at its discretion may award the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery, taking into account the prosecuting authority's contribution to investigating and conducting the action.

(3) If the state or political subdivision does not proceed with an action under subdivision (c), the qui tam plaintiff shall, subject to paragraphs (4) and (5), receive an amount that the court decides is reasonable for collecting the civil penalty and damages on behalf of the government. The amount shall be not less than 25 percent and not more than 50 percent of the proceeds of the action or settlement and shall be paid out of these proceeds.

(4) If the action is one provided for under paragraph (4) of subdivision (d), the present or former employee of the state or political subdivision is not entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff those sums from the proceeds as it considers appropriate, but in no case more than 33 percent of the proceeds if the state or political subdivision goes forth with the action or 50

1 percent if the state or political subdivision declines to go forth,
2 taking into account the significance of the information, the role of
3 the qui tam plaintiff in advancing the case to litigation, and the
4 scope of, and response to, the employee's attempts to report and
5 gain recovery of the falsely claimed funds through official
6 channels.

7 (5) If the action is one that the court finds to be based primarily
8 on information from a present or former employee who actively
9 participated in the fraudulent activity, the employee is not entitled
10 to any minimum guaranteed recovery from the proceeds. The court,
11 however, may award the qui tam plaintiff any sums from the
12 proceeds that it considers appropriate, but in no case more than 33
13 percent of the proceeds if the state or political subdivision goes
14 forth with the action or 50 percent if the state or political
15 subdivision declines to go forth, taking into account the
16 significance of the information, the role of the qui tam plaintiff in
17 advancing the case to litigation, the scope of the present or past
18 employee's involvement in the fraudulent activity, the employee's
19 attempts to avoid or resist the activity, and all other circumstances
20 surrounding the activity.

21 (6) The portion of the recovery not distributed pursuant to
22 paragraphs (1) to (5), inclusive, shall revert to the state if the
23 underlying false claims involved state funds exclusively and to
24 the political subdivision if the underlying false claims involved
25 political subdivision funds exclusively. If the violation involved
26 both state and political subdivision funds, the court shall make an
27 apportionment between the state and political subdivision based
28 on their relative share of the funds falsely claimed.

29 (7) For purposes of this section, "proceeds" include civil
30 penalties as well as double or treble damages as provided in Section
31 12651.

32 (8) If the state, political subdivision, or the qui tam plaintiff
33 prevails in or settles any action under subdivision (c), the qui tam
34 plaintiff shall receive an amount for reasonable expenses that the
35 court finds to have been necessarily incurred, plus reasonable costs
36 and attorney's fees. All expenses, costs, and fees shall be awarded
37 against the defendant and under no circumstances shall they be
38 the responsibility of the state or political subdivision.

39 (9) If the state, a political subdivision, or the qui tam plaintiff
40 proceeds with the action, the court may award to the defendant its

1 reasonable attorney's fees and expenses against the party that
2 proceeded with the action if the defendant prevails in the action
3 and the court finds that the claim was clearly frivolous, clearly
4 vexatious, or brought primarily for purposes of harassment.

5 *(10) If the state, a political subdivision, or the qui tam plaintiff*
6 *proceeds with an action relative to a claim arising from a public*
7 *works contract, as defined by Section 1101 of the Public Contracts*
8 *Code, the court shall award to the defendant its reasonable*
9 *attorney's fees and expenses against the party that proceeded with*
10 *the action if the defendant prevails in the action.*

11 (h) The court may stay an act of discovery of the person
12 initiating the action for a period of not more than 60 days if the
13 Attorney General or local prosecuting authority show that the act
14 of discovery would interfere with an investigation or a prosecution
15 of a criminal or civil matter arising out of the same facts, regardless
16 of whether the Attorney General or local prosecuting authority
17 proceeds with the action. This showing shall be conducted in
18 camera. The court may extend the 60-day period upon a further
19 showing in camera that the Attorney General or local prosecuting
20 authority has pursued the criminal or civil investigation or
21 proceedings with reasonable diligence and any proposed discovery
22 in the civil action will interfere with the ongoing criminal or civil
23 investigation or proceedings.

24 (i) Upon a showing by the Attorney General or local prosecuting
25 authority that unrestricted participation during the course of the
26 litigation by the person initiating the action would interfere with
27 or unduly delay the Attorney General's or local prosecuting
28 authority's prosecution of the case, or would be repetitious,
29 irrelevant, or for purposes of harassment, the court may, in its
30 discretion, impose limitations on the person's participation,
31 including the following:

- 32 (1) Limiting the number of witnesses the person may call.
33 (2) Limiting the length of the testimony of the witnesses.
34 (3) Limiting the person's cross-examination of witnesses.
35 (4) Otherwise limiting the participation by the person in the
36 litigation.

37 (j) The False Claims Act Fund is hereby created in the State
38 Treasury. Proceeds from the action or settlement of the claim by
39 the Attorney General pursuant to this article shall be deposited
40 into this fund. Moneys in this fund, upon appropriation by the

1 Legislature, shall be used by the Attorney General to support the
2 ongoing investigation and prosecution of false claims in furtherance
3 of this article.

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